(12)

No. 91-990

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DALE FARRAR and PAT SMITH,
as Co-Administrators of the Estate
of Joseph D. Farrar, Deceased,

Petitioners,

vs.

WILLIAM P. HOBBY, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE COUNTY OF LOS ANGELES AS AMICUS CURIAE IN SUPPORT OF RESPONDENT WILLIAM P. HOBBY, JR.

DE WITT W. CLINTON
County Counsel
S. ROBERT AMBROSE
Asst. County Counsel
PATRICK T. MEYERS
Principal Deputy
County Counsel
648 Hall of Administration
500 West Temple St.
Los Angeles, CA 90012
(213) 974-1900

RICHARD P. TOWNE, ESQ.*
KEITH A. FINK, ESQ.
COTKIN & COLLINS
201 N. Figueroa St.
Suite 1100
Los Angeles, CA 90012
(213) 250-3600

*Counsel of Record

QUESTION PRESENTED

Is a plaintiff who seeks a large damage award, but recovers only one dollar as nominal damages for a technical violation of his constitutional rights, a "prevailing party" within the meaning of 42 U.S.C. § 1988 and this Court's decisions in Hewitt v. Helms[1/], Rhodes v. Stewart[2/], and Texas State Teachers Assn. v. Garland?[3/]

1/ Hewitt v. Helms, 482 U.S. 755 (1987).

2/ Rhodes v. Stewart, 488 U.S. 1, 3-4 (1988).

3/ Texas State Teachers Assn. v. Garland Indep. School Dist., 489 U.S. 782 (1989).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES:

OTHER AUTHORITIES:

No. 91-990

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

DALE FARRAR and PAT SMITH,
as Co-Administrators of the Estate
of Joseph D. Farrar, Deceased,

Petitioners,

vs.

WILLIAM P. HOBBY, JR.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF OF THE COUNTY OF LOS ANGELES AS AMICUS CURIAE IN SUPPORT OF RESPONDENT WILLIAM P. HOBBY, JR.

INTEREST OF THE AMICUS

The County of Los Angeles which appears as Amicus[4/] in this action has an abiding interest in this case as an entity which has been and is currently subject to substantial attorneys' fees awards in cases where nominal damages of one dollar ($1) have been awarded.[5/]

The Judgment of the Fifth Circuit in this case, Farrar v. Cain, 941 F.2d 1311 (5th Cir. 1991), is in direct conflict with the Ninth Circuit's decision in Romberg. This Amicus submits that Farrar is correct and should be upheld by this Court because

---

4/ Respondent's consent letter is attached as an exhibit to this brief.

5/ See, e.g., Romberg v. Nichols, 953 F.2d 1152 (9th Cir. 1992) (nominal damage award of one dollar; attorneys' fees award of $29,137.50). Defendants in Romberg are deputy sheriffs of the County of Los Angeles. Their Petition for Rehearing En Banc to the Ninth Circuit Court of Appeals has been pending since January 26, 1992.

the Petitioners were not "prevailing parties" in the underlying action. For the reasons set forth herein, a reversal of Farrar would promote the deception of juries and conflicts of interest between civil rights plaintiffs and their counsel. The result would be to encourage district courts to " . . . reward lawyers who, in the later stages of the fight, abandon their client's interest to pursue their own when the battle seems otherwise lost . . . [by asking for nominal damages] in order to preserve prevailing party status . . . ."[1/]

[1/] This Brief focuses solely on the conflict of interest which would be encouraged if Petitioners' position were adopted by this Court. (This point is briefly addressed in Respondent's Brief at pages 17-18) While the touchstone of the "prevailing party" inquiry is whether there has been a material alteration in the legal relationship, this Brief omits a discussion of why nominal damages alone do not meet the threshold for entitlement to fees since Respondent and the Amici from Hawaii and Nevada have thoroughly addressed this point.

Romberg, supra, 953 F.2d at 1160.

ARGUMENT

1. ALLOWING A PLAINTIFF WHO ONLY RECOVERS NOMINAL DAMAGES OF ONE DOLLAR TO COLLECT ATTORNEYS' FEES IS CONTRARY TO THE PURPOSE OF § 1988 BECAUSE IT ENCOURAGES A CONFLICT OF INTEREST BETWEEN THE ATTORNEY AND CLIENT.

A. The Adoption of Petitioners' Position Would Encourage Unjust Results and Jury Deception

The problem presented to the Amicus by this Petition is very real; not only to the County of Los Angeles as an entity responsible to indemnify[2] its law enforcement officers, but also to its taxpayers. If this Court reverses the Fifth Circuit's denial of attorneys' fees to the Petitioners, civil rights plaintiffs' counsel will

---

[2] California Government Code Section 825(a); MacDonald v. Musick, 425 F.2d 373, 376 (9th Cir. 1970), cert. den. 400 U.S. 852 (1970).

be encouraged to argue to the jury in non-meritorious or losing cases that, as in Romberg, supra:

> "Mr. and Mrs. Romberg in this case don't want any money. They want you to vindicate their rights. If you find their rights were violated, you can award what's called nominal damages in some sum like one dollar. And I think that's all they're entitled to in this case, is nominal damages." Id. at 1160.

Romberg is typical of a growing trend of cases brought under 42 U.S.C. § 1983 involving alleged civil rights violations because it involved a prayer for several million dollars in money damages yet resulted in a verdict of nominal damages only.[3]

---

[3] See, e.g., Romberg, supra, (Jury award of one dollar for Forth Amendment violation, even though plaintiff initially sought two million dollars in relief); Lewis v. Kendrick, 944 F.2d 949 (1st Cir. 1991) (Jury award for Fourth Amendment violation was technical and *de minimis* where plaintiff sought $300,000 and received jury verdict for $1,000).

Interestingly, in the instant case, the jury's verdict in the District Court was for Petitioner with no money damages whatsoever.

Typical of this trend of cases, where plaintiffs' counsel have made eleventh hour pleas for nominal damages, is Brooks v. Cook, 938 F.2d 1048, 1050 (9th Cir. 1991) in which this Amicus was involved. The complaint sought $2,000,000 but by the time of trial plaintiff's trial counsel, sensing he would not otherwise prevail, reduced his request in summation to "a nominal verdict of one dollar" so that he would be eligible for attorneys' fees.

In these cases the plaintiff loses because he or she recovers no damages, and the defendants lose because they must pay the attorneys'

fees of both sides; the only winners are the plaintiff's counsel. This Amicus suggests that this Court adopt a rule that in civil rights cases where only nominal money damages are sought or awarded, the District Court must order that plaintiff demonstrate that the judgment materially affected the legal relationship between the plaintiff and the defendant in order to award fees.[2/] This rule is consistent with and would further the statutory interpretation of the "prevailing party" concept set forth

---

[2/] See, e.g., Spencer v. General Electric Co., 894 F.2d 651, 662 (4th Cir. 1990) (Plaintiff who received nominal damage award entitled to 'prevailing party' status since in addition to monetary recovery, his suit served as a catalyst for prompt development and promulgation of the employers anti-harassment policy.) Cf. Denny v. Hinton, 131 F.R.D. 659 (M.D.N.C. 1990) (Jury verdict of one dollar was *de minimis*, since judgment had no effect on relationship between plaintiff and defendant.), aff'd mem., Denny v. Elliot,, 937 F.2d 602 (4th Cir. 1991) and Lawrence v. Hinton, 937 F.2d 603 (4th Cir. 1991).

in this Court's decision in Texas State Teachers, supra, 489 U.S. at 792-3.

Regrettably, the Romberg and Brooks decisions of the Ninth Circuit seem to compel attorneys' fees awards where only nominal damages are recovered.[10/] In affirming the decision of the Fifth Circuit, this Court should clarify that District Courts have the discretion to prevent such abuses of the system by granting such awards to plaintiffs' counsel who "recognize that [their] own case is not especially strong [and] drastically reduces [their] initial claims and asks the jury for nominal

---

10/ Other decisions of the Ninth Circuit are irreconcilable with Romberg and Brooks. See., e.g., Robinson v. Arivoshi, 933 F.2d 781 (9th Cir. 1991); BSA, Inc. v. King County, 804 F.2d 1104, 1112 (9th Cir. 1986). This intra-circuit conflict could be resolved by this Court's decision upholding the Fifth Circuit.

damages." Romberg, supra, 953 F.2d at 1160.

As District Judge Williams stated in the Brooks trial record to the plaintiff's counsel:

> "Well, what you're asking me to do then is to let you, uh, pull a sneaker on the jury, and get away with it . . . . So you could then come in [sic] say I'm the prevailing party, so give me attorneys fees.
> . . . .
> I'm not going to let the jury go into that deliberation room with, uh, that--I don't want to use the word fraud but I'll use it--pull upon them. My job is to instruct the jury, not to deceive them."

Brooks, supra, 938 F.2d at 1050.[11/]

11/ In a situation such as this, where attorney's fees may be awarded following a $1.00 damage award, the plea for nominal damages represents more than just a plea for vindication - - it is a request that the jury unknowingly give plaintiff's counsel the right to subsequently seek, outside of their presence, an amount of money potentially tens of thousands of times the amount of the nominal damage award. Then, under Venegas v. Mitchell, 495 U.S. 82, 87 (1990) the plaintiff's counsel could redistribute the fees to his client, effectively thwarting the

This Court should discourage any future "sneakers" by upholding Farrar.

B. The *Romberg* Case Illustrates the Problems of Conflict of Interest and Deception of the Jury

In Romberg, supra, plaintiff's counsel acknowledged the limited significance and technical nature of plaintiff's only remaining claim by arguing at the close of the trial for nothing more than nominal damages.[12] The jury's award of $1.00 to each plaintiff and against the individual deputy defendants, while denying them punitive damages, demonstrated their belief that the defendants were acting in good faith. The peculiar facts of this one isolated incident lead to

---

jury system.

[12] Before trial concluded, the District Court dismissed the County, one deputy sheriff and most of plaintiff's claims. Romberg, supra, at 1155.

considerable doubt that the verdict rendered would have any far-reaching effect in furtherance of Fourth Amendment rights in general. The fact that the deputies were acting out of a good faith concern for the safety of others negates any deterrent effect[13] that that case would otherwise have.

Last minute requests for nominal damages at the close of testimony where high damages were originally sought have ramifications beyond the desired message that only an isolated and technical violation has occurred. These strategic "bailout pleas" drastically and unfairly reduce the

---

[13] The Farrar's District Court's implicit assumption that the case would contribute to deterring "impermissible conduct by government officers" is baffling. (Pet.App.A-23, 24, 25, cited in Petitioners Brief at pg. 19). No showing has been made by Petitioners that the mere garnering of a jury verdict, with no money damages, has led to or was intended to lead to a change in anyone's behavior.

possibility that the jury will return defense verdicts and award no damages at all. Through such arguments, plaintiff's counsel can expressly invite juries to provide plaintiffs technical and *de minimis* victories solely to preserve "prevailing party" status for purposes of § 1988. Although this Amicus does not belittle a plaintiff's sense of vindication nor doubt their counsel's general sincerity, to award attorney's fees to plaintiffs as "prevailing parties" in cases such as Romberg is contrary to the legislative intent behind § 1988[11] and the touchstone established by this Court in Texas State Teacher's.

In light of the importance of

---

[11] Congress did not intend for § 1988 to provide a "windfall" to civil rights attorneys. See, Riverside v. Rivera, 477 U.S. 561, 580 (1986).

upholding individual constitutional rights, this Amicus does not propose that plaintiffs receiving nominal damages never be considered as prevailing parties for purposes of § 1988. Such a rule would discourage future plaintiffs from seeking vindication of their civil rights through the Courts. This Amicus does not seek this result.

However, by affirming the District Courts' discretion to deny attorneys' fees and prevailing party status to plaintiffs who prevail only in the technical or *de minimis* sense, this Court can reaffirm the proper balance between the right of citizens to seek redress in the Courts and the Court's right to protect the court system and the taxpayers from the abuse exemplified by Romberg and

Petitioners' position in this case. Of grave concern to this Amicus is the creation of new precedent in this case which will encourage plaintiffs' civil rights attorneys to enter into contingency fee agreements with clients seeking compensatory damages at the outset while reserving the right to, at the close of testimony, weigh the odds of success, and if unfavorable, request only nominal damages in an effort to preserve attorneys fees under § 1988.

In this scenario, only plaintiff's counsel wins. The plaintiff, who filed suit hoping for compensatory damages, receives nothing; defendant, whose client did not justify actual or punitive damages, is forced to pay high attorney's fees, and the courts are

burdened with increased litigation.

Few juries are likely to resist a plea for nominal damages at the close of the trial. Juries are generally unaware that an award of even $1.00 - - - or perhaps even one cent - - - could entitle a plaintiff to receive attorney's fees from the defendant. From the jury's perspective, a nominal award in response to plaintiff's counsel's request gives them the apparent opportunity to "make everybody happy" by giving plaintiff a token win at no real financial cost to the defendant. Yet, this is the kind of "compromise verdict" which is clearly prohibited.[12] The instant case

---

[12] "Part of a district court's function, . . . is to prevent such 'Solomonic solutions' by the jury. When a jury compromises its verdict, its verdict should not stand. Romberg, supra, 953 F.2d 1160; National R.R. Passenger Corp. v. Koch Indus.,

provides an opportunity to discourage future Romberg-type abuses of the Civil Rights Attorney's Fees Awards Act. This Amicus submits, as it argued in Romberg, that a technical violation of civil rights made by defendants acting in good faith should not support prevailing party status, particularly when a plaintiff's initial request for exorbitant damages is reduced to a concession that the evidence supports at the close of trial only nominal damages. The encouragement of such tactics defies principles of judicial economy and is directly contrary to the legislative principles underlying § 1988 and the

---

701 F.2d 108, 110 (10th Cir. 1983) ("A compromise verdict is one reached when the jury, unable to agree on liability, compromises that disagreement and enters a low award of damages . . . [s]uspicion should be aroused if the jury awards only nominal damages.)

reasoning of this Court. This Court should speak clearly and forcefully in this case that such tactics are not to be rewarded by upholding the decision of the Fifth Circuit Court of Appeals.

CONCLUSION

The judgment of the United State Court of Appeals for the Fifth Circuit should be affirmed.

DATED: June 15, 1992

Respectfully submitted,

BY Richard P. Towne
RICHARD P. TOWNE, ESQ.*
KEITH A. FINK
COTKIN & COLLINS

DE WITT W. CLINTON
County Counsel
S. ROBERT AMBROSE
Asst. County Counsel
PATRICK T. MEYERS
Principal Deputy
County Counsel

*Counsel of Record

APPENDIX

OTHER OFFICES
HOUSTON
WASHINGTON, D. C.
DALLAS

BAKER & BOTTS
1600 SAN JACINTO CENTER
98 SAN JACINTO BLVD.
AUSTIN, TEXAS 78701-4039

TELEPHONE (512) 322-2500
FAX (512) 322-2501

14036-0101

June 11, 1992

BY TELECOPY

Mr. Keith A. Fink
Cotkin, Collins & Franscell
201 N. Figuero Street, Suite 1100
Los Angeles, California 90053-0496

Re: *Farrar v. Hobby*, cause no. 91-990 in the Supreme Court of the United States

Dear Mr. Fink:

I am writing on behalf of our client, William P. Hobby, Jr., the respondent in the above case.

We consent to the filing of an *amicus* brief by the County of Los Angeles in support of the respondent's position.

Thank you again for your interest and assistance.

Very truly yours,

Patrick O. Keel